



October 15, 2001

Ms. Lavergne Schwender
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2001-4655

Dear Ms. Schwender:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153309.

The Harris County Purchasing Agent (the "county") received a request for a copy of the winning proposal submitted to the county by Electronic Transaction Consultants, Inc. ("ETC"), in response to Harris County Purchasing Department Job No. 01/0064, "any technical evaluations or review comments generated during the proposal review, and the resultant contract." Although the county has taken no position as to the release of the requested information, you have notified ETC of the request for information pursuant to section 552.305 of the Government Code.¹ ETC responded with a brief to this office in which it argues that the requested information is protected as both a trade secret and as commercial or financial information under section 552.110 of the Government Code. ETC also makes arguments under section 552.101 and 552.104. We have considered ETC's arguments and have reviewed the submitted information.

We first address ETC's argument that section 262.030(c) of the Local Government Code, in conjunction with section 552.101 of the Government Code,² makes the requested information confidential. Section 262.030(c) provides that all proposals that have been submitted under

¹See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

this section "shall be available and open for public inspection after the contract is awarded, *except for trade secrets and confidential information contained in the proposals and identified as such.*" Loc. Gov't Code § 262.030(c) (emphasis added). Thus, section 262.030 provides the opportunity for a submitting company to assert protection under section 552.110 of the Government Code for information in a submitted proposal. We note that the mere designation of information as confidential or as a trade secret in a proposal submitted under section 262.030 does not in itself establish that the information may be withheld. *See* Open Records Decision No. 565 (1990) (information held by governmental body is public unless excepted from disclosure by one or more of Public Information Act's specific exceptions). An exception must therefore be established before the information may be withheld.

We now address ECT's argument under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (b) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising section 552.110(b) must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Based on the arguments of ECT, and our review of the submitted information, we conclude that ECT has established that release of most of the information it seeks to withhold in Volumes 2, 3 and 4 of its proposal, as well as certain additional documents relating to the proposal, are protected under section 552.110(b) because their release would result in substantial competitive harm to ETC.³ Therefore, in Volume 2, the county must withhold the financial statement, the ETC balance sheet as of April 30, 2001, the Profit and Loss Statement, the draft Professional Services and End User Software License Agreements, and the section entitled "Options." In Volume 3, the county must withhold Exhibits 2A through 2I. In Volume 4, the county must withhold Exhibits 2J through 3J, with the exception of that portion of Exhibit 3H which sets forth "ETC Key Personnel Biographies." *See* Open Records Decision No. 319 at 3 (1982) (stating that statutory predecessor to section 552.110 ordinarily does not protect information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

In addition, the county must withhold under section 552.110(b) the May 30, 2001 PowerPoint presentation entitled "Oral Presentations for Toll Collection Computer Systems and Software Maintenance RFP #01/0064," with the exception of page 4, "Presentation

³To the extent we conclude that section 552.110(b) does not except the information, we believe that section 552.110(a) also has not been demonstrated to apply.

Participants,” and page 5, “Key Personnel and Assignment.” *See* ORD No. 319 (1982). The county must also withhold the June 7, 2001 response by ETC to the county’s June 5, 2001 Request for Clarification Letter under section 552.110(b).⁴

For the information we find not to be excepted under section 552.110, we will address ETC’s argument under section 552.104. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the county does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov’t Code § 552.104 may be waived by governmental body). Therefore, the requested information may not be withheld under section 552.104.

Finally, we note that the request seeks the contract entered into between the county and ETC. ETC notes in its brief to this office that “despite a confidentiality agreement, and a right to withhold certain provisions of the Agreement, (the county) has already disclosed the entire agreement to (the requestor).” However, the county has made no such assertion to this office. Therefore, in the event that the county has not released the final contract entered into between it and ETC, including the Schedule of Prices for the New Software, Computer Systems, and Software Maintenance, it must do so. We find that this final contract and the schedule of prices agreed upon, as well as the 3-page schedule of prices in Volume 2 of the proposal, are not protected under either prong of section 552.110 of the Government Code now that the contract has been awarded. *See* Gov’t Code § 552.022(a)(3); Open Records Decision No. 319 (1982) (stating that pricing proposals are entitled to protection only during bid submission process); Freedom of Information Act Guide & Privacy Act Overview 136-138, 140-141, 151-152 (1995) (disclosure of prices is cost of doing business with government). *Cf.* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors).

To summarize, in Volume 2 of ETC’s proposal, the county must withhold the financial statement, the ETC balance sheet as of April 30, 2001, the Profit and Loss Statement, the draft Professional Services and End User Software License Agreements, and the section entitled “Options.” In Volume 3, the county must withhold Exhibits 2A through 2I. In Volume 4, the county must withhold Exhibits 2J through 3J, with the exception of that portion of Exhibit 3H which sets forth “ETC Key Personnel Biographies,” which must be released to the requestor. In addition, the county must withhold the May 30, 2001 PowerPoint presentation entitled “Oral Presentations for Toll Collection Computer Systems and Software Maintenance RFP #01/0064,” with the exception of page 4, “Presentation

⁴We note that stapled to the June 7, 2001 response by ETC are additional copies of the draft Professional Services and End User Software License Agreements, and Schedule of Prices. These must be withheld under section 552.110(b) as well.

Participants,” and page 5, “Key Personnel and Assignment,” which must be released to the requestor. The county must also withhold the June 7, 2001 response by ETC to the county’s June 5, 2001 Request for Clarification Letter. The final contract entered into between the county and ETC, including the Schedule of Prices for the New Software, Computer Systems, and Software Maintenance, as well as the 3-page schedule of prices in Volume 2 of the proposal, must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 153309

Enc. Submitted documents

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